United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

273

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19213

DAVID R. WEINBERG, APPELLANT

v.

JOHN W. MACY, JR., COMMISSIONER OF CIVIL SERVICE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' MOTION FOR CLARIFICATION AND, IN THE ALTERNATIVE, PETITION FOR REHEARING OR REHEARING EN BANC

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

C.A. No. 916-64

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(C.A. No. 916–64)

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JOHN W. MACY, JR., COMMISSIONER OF CIVIL SERVICE COMMISSION, ET AL., APPELLEES

APPELLEES' MOTION FOR CLARIFICATION AND, IN THE ALTERNATIVE, PETITION FOR REHEARING OR REHEARING EN BANC

For the reasons which follow, the undersigned attorneys on behalf of appellees, the Chairman and Members of the United States Civil Service Commission, *et al.*, respectfully move for clarification of this Court's December 22, 1965, opinion and, in the alternative, petition this Court for a rehearing or rehearing *en banc* in this cause.[1]

1. This case arose from the dismissal of appellant Weinberg from his civil service position with the Internal Revenue Service on a charge of falsifying his application for employment. Appellant's discharge was upheld on his appeal to the Civil Service Commission. Mr. Weinberg's suit in the district court for review of the Commission's action resulted in a judgment affirming the Civil Service Commission decision.

On December 22, 1965, this Court reversed that district court decision and ordered the cause remanded "for further proceedings not inconsistent with this opinion" (slip opinion,

[1] By order of the Court, appellees' time in which to petition for rehearing or in the alternative for rehearing *en banc* was extended to and including April 22, 1966.

215-407—66

p. 8). While we do not agree with the premise in the decision that the administrative record as it now stands does not fully sustain the discharge on review by the courts, we do not herein press this point. However, we do press what we believe to be the most urgent issue—the appropriate forum in which further evidence is to be taken. We are not clear whether the Court intended any additional evidence to be received and evaluated in the first instance by the district court rather than by the Civil Service Commission. In view of the Court's decision (albeit by a different panel) handed down only six days after this case holding that civil service discharge cases—as the instant proceeding—"are heard on the record made before the [Civil Service] Commission, [and] the standard of judicial review [in the district court] is that of whether there is evidence of substance in that record which supports the Commission's view of the matter," (*Dabney* v. *Freeman, et al.*, No. 19,207, decided December 28, 1965, slip opinion, p. 4), we believe that the Court intended that any further evidence be taken by the Commission. As the cases cited at note 3 in the *Dabney* opinion indicate, this is the usual rule in this circuit in civil service discharge cases. (See also *Mendelson* v. *Macy*, No. 19,310, decided January 13, 1966, and *Goodman* v. *United States*, No. 19,654, decided March 10, 1966). Other circuits likewise agree that there is no trial *de novo* in the district court.[2]

If our assumption in this regard is correct, our request is that the Court's opinion in this case be clarified so as to manifest that no departure from the usual course of review was intended. A statement to the effect that further evidentiary proceedings are to be before the Civil Service Commission, subject to review by the district court under the standards announced, most recently, in *Dabney* and *Mendelson*, would, we feel, be sufficient to avoid any possibility of confusion in future litigation of this nature. As the Court is undoubtedly aware, a not inconsiderable number of civil service discharge cases is pending before the district court and the Civil Service Commission at all times.

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[2] See, e.g., *Baum* v. *Zuckert*, 342 F. 2d 146 (C.A. 6); *Chiriaco v. United States*, 339 F. 2d 588 (C.A. 5); *Seebach* v. *Cullan*, 338 F. 2d 663 (C.A. 9).

2. In the event, however, that we have misconstrued the Court's opinion and that decision was in fact intended to require that further evidence be received by the district court and not by the Civil Service Commission (a matter briefed by neither the government nor appellant in this case), we respectfully request that the court reconsider its decision. As we pointed out above, it is in direct conflict with the square holding of another panel of this Court in *Dabney* v. *Freeman, et al., supra,* and cases there cited (slip opinion, page 4) as well as with the uniform course of decisions of other courts of appeals. See cases cited at note 2, *supra.* As those cases make clear, Congress has allotted to the Civil Service Commission the duty of superintending the discharge of civil service employees of the Federal Government. Accordingly, it has made the Commission the trier of fact in these matters. As another panel of this Court recognized in *Dabney* (slip opinion, p. 8):

> The job of hearing the evidence and drawing a conclusion was the [Civil Service] Commission's and review of its work in the District Court involves not an independent determination by it from the cold record but, rather, a scrutiny of that record to see whether it is so lacking in support as to make the Commission's action unacceptably arbitrary.

If the panel declines to rehear its decision, then we respectfully ask that the matter be reheard by the Court *en banc* in order to resolve the intra-circuit conflict.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court clarify its December 22, 1965 opinion as suggested in point 1, or, in the alternative, grant a rehearing or a rehearing *en banc*.

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

FRANK Q. NEBEKER,
Assistant United States Attorney.

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